

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 68 of 1998

For Approval and Signature:

Hon'ble MISS JUSTICE R.M.DOSHIT

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

KAMLESH KANTILAL MAKWANA

Versus

STATE OF GUJARAT

Appearance:

MR YS LAKHANI for Petitioner

MR SR DIVETIA APP for Respondent No. 1

CORAM : MISS JUSTICE R.M.DOSHIT

Date of decision: 19/06/98

ORAL JUDGEMENT

Heard the learned advocates Mr.Y.S.Lakhani and Mr.S.R.Divetia for the petitioner and the respondents respectively.

This application under section 397 of the

Criminal Procedure Code arises of the permission granted by the learned trial Judge to the prosecution to put certain questions to the prosecution witness one Kantibhai Ladhahbai. The prosecution is lodged in respect of the unnatural death of Vandna the daughter of witness Kantibhai Ladhahbai, who lodged complaint with the police. The incident occurred on 25th March, 1996. In course of trial, the complainant Kantibhai Ladhahbai is examined as Prosecution Witness No.1. It appears that in his examination-in-chief, the complainant Kantibhai Ladhahbai made certain statements which were contrary to the statements made in his complaint. The learned PP, therefore, sought permission of the learned trial Judge to cross-examine the complainant without declaring him hostile. The application was objected to on behalf of the accused-petitioner. The learned trial Judge, however, over-ruled the objection and permitted the learned PP to proceed further to cross-examine the witness without declaring him hostile. In pursuance thereof, the learned PP asked three questions to elicit a specific answer from the witness. The said witness was thereafter cross-examined by the defence. Even after his cross-examination, the learned PP sought permission to cross-examine the witness without declaring him hostile in respect of certain contradictory statements made by the witness in his examination-in-chief and the cross-examination. This application was also objected to by the defence. The said objection was over-ruled and permission was granted. Feeling aggrieved, the accused has preferred this Revision Application.

Mr. Lakhani read-over the testimony of the said witness Kantibhai Ladhahbai and has submitted that the questions framed by the learned PP are leading questions and could not have been asked in examination-in-chief. He has submitted that if at all the witness is required to be cross-examined by the learned PP, he ought to have been first declared to be hostile. He has further submitted that further cross-examination has been sought by the learned PP with a view to filling in the lacunae in the deposition of the said witness. Mr. Lakhani has submitted that the procedure adopted by the learned PP and permitted to be adopted by the learned trial Judge is contrary to law and requires to be quashed. He has relied upon sections 141 and 142 of the Indian Evidence Act, 1872 and has submitted that the learned PP could not have been permitted to put leading questions to the prosecution witness. He has submitted that the questions put by the learned PP are in respect of matters which are neither introductory nor undisputed nor can they be said to have been sufficiently proved. The learned trial

Judge, therefore, was not right in permitting the learned PP to ask leading questions to the said witness. He has also relied upon the judgment of the Supreme Court in the matter of VARKEY JOSEPH VS STATE OF KERALA (AIR 1983, SC 1892) . He has particularly relied upon paragraph 11 of the judgment . The court held that - " The attention of the witness can not be directed in chief examination to the subject of the enquiry/trial . The court may permit leading question to draw the attention of the witness which can not otherwise be called to the matter under enquiry, trial or investigation . The discretion of the court must only be controlled towards that end but a question which suggests to the witness, the answer the prosecutor expects must not be allowed unless the witness with the permission of the court is declared hostile and cross examination is directed thereafter in that behalf."

Mr. Divetia, the learned APP has contested the petition and has submitted that the only intention of the learned PP was to confront the witness with the contradictions in the statement made by him in the complaint lodged by him and the statements made in the course of examination-in-chief. He has, therefore, submitted that the procedure adopted by the learned PP is only with a view to meeting the ends of justice and the same should be upheld.

I can not accept the averments made by Mr. Divetia. The questions asked to the witness Kantibhai are leading questions and the matter in respect of which such questions were asked is the subject matter of trial. The questions asked by the learned PP do contain the answers which the learned PP expected/desired to receive from the witness and such questions should not have been asked in examination-in-chief without declaring the witness hostile. Further the witness could not have been subjected to further cross-examination by the learned PP that too without declaring him hostile. I am, therefore, of the view that the learned trial Judge has manifestly erred in permitting the learned PP to ask leading questions to the prosecution witness without declaring him hostile. The action, therefore, requires to be set aside.

In the result, this application is allowed. The deposition of the prosecution witness Kantibhai Ladhahbai from the stage the learned PP sought permission to cross-examine him without declaring him hostile i.e. deposition after paragraph-3 on page 2 is ordered to be deleted. The witness may be further examined from the

stage of paragraph-3 onwards in accordance with law. Rule
is made absolute. There shall be no order as to costs.

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JOSHI